

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Telscape Communications, Inc.,

Complainant,

vs.

Pacific Bell Telephone Company,

Defendant.

Case 02-11-011  
(Filed November 5, 2002)

**SCOPING MEMO AND RULING OF ASSIGNED COMMISSIONER**

**Summary**

Pursuant to Rules 6(b)(3) and 6.3 of the Commission's Rules of Practice and Procedure,<sup>1</sup> this ruling sets forth the schedule, assigns a presiding hearing officer, and addresses the scope of the proceeding, following a prehearing conference (PHC) held on January 7, 2003.

**Background**

Complainant Telscape Communications, Inc. (Telscape) is a facilities-based competitive local exchange carrier that provides facilities-based and resold local and interexchange telecommunications services to customers in Southern

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<sup>1</sup> Unless otherwise indicated, all subsequent citations to rules refer to the Rules of Practice and Procedure, which are codified at Chapter 1, Division 1 of Title 20 of the California Code of Regulations, and citations to sections refer to the Public Utilities Code.

California. Telscape alleges that defendant Pacific Bell Telephone Company (Pacific) has violated the requirements of Pub. Util. Code §§ 451 and 453 by engaging in a variety of anticompetitive practices.

Telscape identifies four broad areas of alleged violations. Telscape claims that Pacific engages in improper “winback” activities directed to customers who switch their service from Pacific to Telscape, including use of customer proprietary network information (CPNI) and offers of discriminatory discounts to customers who are switching their service. Telscape asserts that Pacific solicits false complaints of “slamming,” unauthorized switching of a customer’s service from Pacific to Telscape, and then reports those false complaints to Telscape and state and federal regulatory agencies. Telscape asserts that Pacific consistently provides inadequate operational support systems (OSS), including inaccurate and untimely wholesale billing and failure to resolve billing disputes promptly.<sup>2</sup> Telscape also claims that Pacific participates in denying digital subscriber line (DSL) services to customers who change their local voice service to a competitor.

Pacific rejects Telscape’s characterization of the problems alleged in the complaint and denies that its activities are improper. Pacific states that it engages in winback activities, but does not abuse CPNI in its winback practices and does not offer any discounts that are not consistent with its tariffs or

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<sup>2</sup> At the PHC, Telscape stated that although some of the instances of OSS problems cited in its complaint had been resolved, some had not been; new problems had also arisen since the complaint was filed. The problems cited in the complaint will therefore be treated as examples of the more general allegations of anticompetitive conduct based on OSS deficiencies. Telscape may introduce evidence of other OSS problems, or of different aspects of the problems cited in the complaint, at the Evidentiary Hearing (EH).

otherwise approved by the Commission. Pacific denies that it incites false slamming complaints and asserts that it is required to report any slamming complaints it does receive to Telscape and to regulators. Pacific asserts that some wholesale billing disputes are inevitable, but that problems that do occur are neither systemic nor part of a pattern of anticompetitive practices. Pacific takes the position that its role in the provision of DSL services is consistent with federal law. Pacific also asserts that its compliance with federal law is a complete defense to Telscape's claims of violations of §§ 451 and 453.

### **Scope of the Proceeding**

Evidentiary hearings will be necessary to resolve the factual disputes that are expected to remain after the parties complete discovery.

At this time, the material facts in dispute include the following:

#### Winback practices

- whether Pacific uses CPNI in winback activities;
- whether Pacific falsely disparages Telscape's services to customers who have switched their service from Pacific to Telscape.

#### Slamming

- whether Pacific reports false slamming complaints to Telscape and regulatory agencies;
- whether any false slamming complaints are solicited, induced, or created by Pacific.

#### Billing/OSS

- whether Pacific consistently overcharges Telscape in its wholesale billing;
- whether wholesale billing disputes take excessive amounts of time to resolve;
- whether Pacific consistently imposes unjustified late charges on Telscape's wholesale bills;

- whether the wholesale billing problems experienced by Telscape are the result of systemic problems with Pacific's OSS.

#### DSL

- whether Pacific participates in refusing to provide DSL service to California retail customers who choose a carrier other than Pacific for their voice services.

The parties dispute whether any or all of the practices alleged in the complaint, even if they are proved true, constitute violations "of any provision of law or of any order or rule of the commission." (§ 1702). For some issues identified in the complaint, subsidiary or more specific legal disputes can also be identified. At this time, such specific disputed legal issues include the following:

#### Winback practices

- whether Pacific improperly uses CPNI in its winback activities;
- whether Pacific's offers of discounts to customers who have switched their service are discriminatory.

#### Slamming

- whether Pacific's reports of slamming complaints about Telscape are in compliance with relevant federal and state law mandates.

#### Billing/OSS

- whether the billing problems experienced by Telscape constitute, in their totality, improper anticompetitive activity by Pacific.

#### DSL

- whether Pacific's activities with respect to the provision of DSL service to customers who do not use Pacific for their voice services are in compliance with federal law.
- whether compliance with federal law constitutes a complete defense to the allegations that Pacific participates in wrongful denial of DSL service to customers who do not use Pacific for their voice services.

## **Discovery**

The parties have begun formal discovery. At the PHC, counsel for Telscape stated that Telscape had served data requests, might serve follow-up data requests, and intended to take depositions. Counsel for Pacific stated that Pacific would serve data requests and reserved the right to take depositions.

At the PHC, counsel for Pacific suggested that Pacific might file a dispositive motion on part or all of the DSL claims, particularly if it appeared that extensive discovery would be involved in preparing these issues for the EH. The parties agreed to address any discovery problems related to those issues promptly and to work to minimize the need for any additional motions.

In view of the schedule for this proceeding, set forth below, it is important that any discovery disputes be resolved promptly. The parties must promptly meet and confer in a good faith effort to resolve any disputes. If that fails, any party may promptly file a written motion in accordance with Rule 45 and schedule it for a Law and Motion session.

Parties shall follow the requirements set forth in the Appendix regarding prepared written testimony and exhibits.

## **Schedule**

The parties have agreed to the following schedule for this proceeding:

April 1, 2003	Concurrent distribution of prepared testimony to all parties, with copy to ALJ
April 22, 2003	Concurrent distribution of prepared reply testimony, if any, to all parties, with copy to ALJ

April 28—May 2, 2003 9:00 a.m.	Evidentiary Hearing, Commission Courtroom, State Office Building, 505 Van Ness Avenue, San Francisco
May 23, 2003	Concurrent opening briefs
June 6, 2003	Concurrent reply briefs, if any; submission of case
August 5, 2003	Presiding Officer's decision filed within 60 days of submission
September 4, 2003	Presiding Officer's decision becomes effective 30 days after mailing (unless appeal filed per § 1701.2(a) and Rule 8.2)

It is my goal to close this case within the 12-month timeframe for resolution of adjudicatory proceedings and this schedule meets that goal. At this time, I foresee no extraordinary circumstances which would warrant an extension of the schedule. The presiding officer may, for good cause shown, alter this schedule within the statutory timeframe.

### **Category of Proceeding and Need for Hearing**

This ruling confirms this case as an adjudication scheduled for hearing, as preliminarily determined by the Commission.

### **Assignment of Presiding Officer**

Administrative Law Judge Anne Simon will be the presiding officer.

### **Ex Parte Rules**

Ex parte communications are prohibited in adjudicatory proceedings under § 1701.2(b) and Rule 7.

**IT IS RULED** that:

1. The scope of the proceeding is as set forth herein.
2. The schedule for this proceeding is as set forth herein.

3. The presiding officer will be Administrative Law Judge Simon.
4. This ruling confirms that this proceeding is an adjudication scheduled for hearing.
5. Ex parte communications are prohibited under Pub. Util. Code § 1701.2(b) and Rule 7 of the Commission's Rules of Practice and Procedure.

Dated January 15, 2003, at San Francisco, California.

/s/ GEOFFREY F. BROWN

Geoffrey F. Brown  
Assigned Commissioner

## **APPENDIX**

### **Prepared Written Testimony and Exhibits**

#### **Service**

All prepared written testimony should be served on all appearances and state service on the service list, as well as on the Assigned Commissioner's office and on the Assigned ALJ. Prepared written testimony should NOT be filed with the Commission's Docket Office.

#### **Identification of Exhibits in the Hearing Room**

Each party sponsoring an exhibit should, in the hearing room, provide **two copies to the ALJ and one to the court reporter**, and have at least five copies available for distribution to parties present in the hearing room. **The upper right hand corner of the exhibit cover sheet should be blank for the ALJ's exhibit stamp.** Thus, if parties "pre-mark" exhibits in any way, they should do so in the upper left hand corner of the cover sheet. Please note that this directive applies to cross-examination exhibits as well. If there is not sufficient room in the upper right hand corner for an exhibit stamp, please prepare a cover sheet for the cross-examination exhibit.

#### **Cross-Examination With Exhibits**

As a general rule, if a party intends to introduce an exhibit in the course of cross-examination, the party should provide a copy of the exhibit to the witness and the witness' counsel before the witness takes the stand on the day the exhibit is to be introduced. Generally, a party is not required to give the witness an advance copy of the document if it is to be used for purposes of impeachment or to obtain the witness' spontaneous reaction. An exception might exist if parties have otherwise agreed to prior disclosure, such as in the case of confidential documents.

#### **Corrections to Exhibits**

Generally, corrections to an exhibit should be made in advance and not orally from the witness stand. Corrections should be made in a timely manner by providing new exhibit pages on which corrections appear. The original text to be deleted should be lined out with the substitute or added text shown above or inserted. Each correction page should be marked with the word "revised" and the revision date.

Exhibit corrections will receive the same number as the original exhibit plus a letter to identify the correction. Corrections of exhibits with multiple sponsors will also be identified by chapter number. For example, Exhibit 5-3-B is the second correction made to Chapter 3 of Exhibit 5.



**(END OF APPENDIX)**

**CERTIFICATE OF SERVICE**

I certify that I have by mail this day served a true copy of the original attached Scoping Memo and Ruling of Assigned Commissioner on all parties of record in this proceeding or their attorneys of record.

Dated January 15, 2003, at San Francisco, California.

/s/ FANNIE SID

Fannie Sid

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074 or TTY# 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.